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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MANUEL VELA, Defendants and Appellants.	B282676 (Los Angeles County Super. Ct. No. BA448895)

APPEAL from a judgment of the Superior Court of Los Angeles County. Frederick N. Wapner, Judge. Affirmed.

Michelle T. Livecchi-Raufi, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney, Paul M. Roadarmel, Jr. and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Manuel Vela appeals his conviction of making a criminal threat. Defendant contends that the trial court abused its discretion by admitting testimony regarding uncharged misconduct, and that the trial court should have given a limiting instruction sua sponte with regard to evidence of one of the incidents of misconduct. Finding no merit to defendant's contentions, we affirm the judgment.

BACKGROUND

Defendant was charged with three counts of making a criminal threat in violation of Penal Code section 422, subdivision (a),[1] each against a separate victim: Shaunte Taylor (Taylor) in count 1; Andrea Tapia (Tapia) in count 2; and Marcia Covington (Covington) in count 3. The information also alleged that defendant had suffered one prior serious or violent felony conviction, within the meaning of section 667, subdivision (a)(1), and of sections 667, subdivision (d)(1), and 1170.12, subdivision (b) (the Three Strikes law). The charge in count 2 (Tapia count) was dismissed after the trial court granted the defense motion pursuant to section 995. Defendant's section 1118.1 motion for judgment of acquittal of count 3 (Covington count) was granted. The jury found defendant guilty of count 1 (Taylor count). Defendant waived a jury trial on the prior conviction allegation, and the trial court found it to be true. On May 16, 2017, the trial court dismissed the prior strike allegation, and sentenced defendant to a prison term of six years four months, comprised of the low term of 16 months, plus a five-year enhancement under section 667, subdivision (a)(1). Defendant was ordered to pay mandatory fines and fees, and was given 564 days of combined

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[1] All further statutory references in this Background summary are to the Penal Code, unless otherwise indicated.

presentence custody credit. Defendant filed a timely notice of appeal from the judgment.

Prosecution evidence

Covington testimony

Covington testified that she had lived on Cochran Avenue for about 10 years and had seen defendant in the neighborhood many times. Defendant's grandmother also lived in the neighborhood for many years, and the women often greeted each other in passing. Once, sometime prior to April 15, 2016, Covington recalled walking toward the store, when she passed defendant loudly swearing into his phone, and saying he was going to get his gun and kill the person to whom he was speaking. Because there was a daycare center next to them, she said, "Come on man. It's kids right there."[2] As Covington continued to walk toward the store, defendant called her "bitch" and other names. When Covington returned from the store, she saw defendant on his grandmother's porch. He said, "I'm going to get you." After she replied, "I'm going to call the cops," defendant said, "Yeah, you scared. You scared." Defendant followed her as she walked past about three houses, and then turned back when she mentioned calling the police. Covington testified that she was scared. After that, defendant periodically came to her gate and rammed his bicycle into it over and over again for a long time.

On April 15, 2016, Covington was again walking to the store, when she saw defendant's grandmother watering the lawn. Covington said, "Hi," and the grandmother returned the greeting. Covington then encountered defendant approaching her, and as they passed on the sidewalk defendant said, "Don't say hi to my

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[2] The daycare center was the one operated by Covington's neighbor, Taylor. Covington's daughter had been enrolled there about six years earlier, but she did not know about any problems between defendant and the daycare center at that time.

grandmother," as he lifted his shirt, revealing a "big knife" in a case. Covington kept walking, and heard defendant angrily tell his grandmother not to talk to her. Covington interpreted defendant's words and gesture to mean that he was going to hurt or kill her someday. After that, Covington has always walked on the other side of the street and carried pepper spray. Defendant never touched her or pulled out the knife.

Covington was interviewed by police on June 28, 2016, and met with a detective at Taylor's residence on July 7.

Taylor testimony

Taylor testified that she had run a licensed daycare center in her home on Cochran Avenue for about 20 years. The center enrolls up to 14 infants, toddlers, and school age children. Taylor resides there with her husband and nine-year-old son. Defendant's grandmother lived next door to the daycare center. They had a good relationship years ago, and did favors for each other. Taylor knew defendant and observed him go into to his grandmother's home about once per month.

One early morning in April 2016, Taylor and her husband took the school-age children to school, and when she returned, defendant was standing in Taylor's driveway wearing a machete, hanging from his belt. Defendant said, "That some punk-bitch-ass shit that you guys did. You called in on my grandparents." Taylor's husband told defendant he was crazy and asked him if he was off his medication. More words were exchanged as Taylor walked toward the house. Defendant then said, "Watch your family," which she interpreted to be a threat to her, her family, and the daycare children. Given defendant's tone and the presence of the machete, and considering his past behavior over the years, Taylor felt frightened. Defendant had not been using the machete to garden when they arrived, and Taylor had never seen him doing yard work with it. Fearing for her life and her

family's lives, Taylor had security cameras installed on her property, filed a police report, and obtained a restraining order.

Prior to that incident, defendant had frequently complained about the daycare noise and parking issues. He called police frequently. Taylor had made two prior calls to the police about defendant. Defendant had threatened parents as they brought their children to the daycare center with his unleashed dog; and he had taken photographs while telling families that they could not park in front of his grandmother's house. One time, the children were in the backyard having lunch when Taylor heard what sounded like a hammer banging on the gate. She looked through a hole in the gate, saw defendant, and called 911.

Uncharged incidents

Vivian Moreno (Moreno) testified that before her mother died, she had lived on Cochran Avenue, and that between January and April 2016, Moreno spent time there, fixing up the house to sell. Once when she parked in front of a house on Cochran Avenue, defendant surprised her by suddenly appearing behind her, yelling. He told her she had better watch her back, and that she should not call the police on her neighbors. He lifted up his jacket or sweatshirt and displayed a sheathed machete hanging on his belt. Moreno was frightened, but did not want to show it, so she tried to walk away. Defendant kept approaching her with his hands on the machete.

Lisa Weaver (Weaver), another resident of the area, testified that she knew defendant's grandmother, and had seen defendant in the neighborhood when he came to visit her. Defendant asked Weaver to go out with him, first about two years ago, and then many times again. She declined each time. In June 2015, Weaver was walking with her two children and two dogs. As she passed defendant's grandmother's house, defendant shocked her by suddenly appearing from behind some trees.

From about 10 to 15 feet away, defendant aggressively told her to keep her dogs off his property, and when she replied, "You don't even own a property on this block so leave me alone," defendant told her that she had better watch herself and to watch her back. He said that she did not know who she was dealing with and he would (or could) wipe her out. She interpreted this to mean that he would do something physical to her, or hurt her. She felt very nervous, unsafe, and shaken. Defendant's tone of voice was aggressive and agitated.

Later that day Weaver returned from the grocery store, and was parked outside her house, which was across the street and about five houses away from defendant's grandmother's house. As she unloaded groceries, Weaver saw defendant at the edge of her property about 10 feet away, with his chest puffed and his elbows held straight out with his hands facing down. Looking straight at her, he watched her every movement. Feeling unsettled, Weaver hurriedly grabbed the rest of the groceries, locked the car, and went into the house. She did not call the police, but was contacted by a detective about a year later.

Defense Evidence

The defense called Los Angeles Police Officer Rigo Medina and Detective Ramon Melendez to testify regarding inconsistent statements made by Covington. In addition, Detective Melendez testified that it is legal to wear a sheathed knife attached to the belt.

DISCUSSION

I. Evidence of uncharged incidents

Defendant contends that the trial court abused its discretion by admitting testimony regarding defendant's uncharged confrontations with Moreno and Weaver. He argues that the evidence was character evidence made inadmissible by Evidence Code section 1101, subdivision (a), which provides that

with some exceptions, "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

In a pretrial motion, the prosecution sought to admit evidence of defendant's uncharged wrongdoing involving Moreno, as well as defendant's conduct toward Tapia, which had been dismissed pursuant to section 995 after the preliminary hearing. At the hearing on the motion, the prosecution added Weaver's testimony to the request to admit evidence. The trial court excluded Tapia's testimony and admitted the testimony of Moreno and Weaver.

The charge of making a criminal threat, involves a statement, willfully made *with the specific intent that it be taken as a threat* to commit a crime which will result in death or great bodily injury to another person "even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety." (§ 422.) The specific intent required by section 422 is not an intent to actually carry out the threatened crime, but an intent that the victim receive and understand the threat. (*People v. Wilson* (2010) 186 Cal.App.4th 789, 806.) When the words of a threat are ambiguous, the intent that the words be taken as a threat must be determined from all the surrounding circumstances. (*In re George T.* (2004) 33 Cal.4th 620, 635.)

The trial court found that the testimony of both Moreno and Weaver was admissible under the exception provided in

Evidence Code section 1101, subdivision (b), to prove defendant's intent that his words be understood as a threat; and the trial court found that the probative value of the evidence would not be outweighed by the potential for under prejudice. "'Evidence that a defendant committed crimes other than those for which he is on trial is admissible when it is logically, naturally, and by reasonable inference relevant to prove some fact at issue, such as motive, intent, preparation or identity. [Citations.] The trial court judge has the discretion to admit such evidence after weighing the probative value against the prejudicial effect. [Citation.] . . .' [Citation.]" (*People v. Fuiava* (2012) 53 Cal.4th 622, 667; § 1101, subd. (b).)

"Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent. [Citation.]" (*People v. Kipp* (1998) 18 Cal.4th 349, 369, citing *People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403 (*Ewoldt*).) The greatest degree of similarity is required when the purpose of the evidence is to prove identity, whereas a lesser degree of similarity is required when the issue is common design or plan, and the least degree of similarity is required when the issue is intent. (*Kipp*, at pp. 370-371.) "On appeal, the trial court's determination of this issue, being essentially a determination of relevance, is reviewed for abuse of discretion. [Citations.]" (*Id.* at p. 369.) "A court abuses its discretion when its ruling 'falls outside the bounds of reason.' [Citation.]" (*Id.* at p. 371.)

Defendant contends that the uncharged incidents were too dissimilar to be probative of his intent in the Taylor incident because each was motivated by a different "personal issue" and precipitated by different provocation. He argues that the only

similarity in the circumstances was that all three women lived on the same street and two of the threats were worded similarly.

Defendant has cited no authority, and we have found none, suggesting that to be admissible, prior crimes or misconduct must all stem from similar provocation or motivation. Furthermore we do not agree that defendant's motivation was different in each incident; he was apparently motivated in each instance by his own anger toward a neighbor of his grandmother, whether provoked or unprovoked. We reject any suggestion in defendant's argument that the prior misconduct and the current crime must be identical. On the contrary, there need only be sufficient similarity to support the inference that the defendant '"'"*probably* harbor[ed] the same intent in each instance.' [Citations.]" [Citation.]' [Citation.]" (*People v. Harris* (2013) 57 Cal.4th 804, 841-842, italics added, quoting *Ewoldt, supra*, 7 Cal.4th at p. 402.)

Defendant's emphasis on a few dissimilarities does not render the prior similar misconduct inadmissible or irrelevant to the issue of intent, as a single "crucial point of similarity" may be sufficient to establish the relevance of the prior misconduct. (*People v. Jones* (2011) 51 Cal.4th 346, 371.) Here the crucial point of similarity was defendant's anger and use of threats in reaction to his apparent perception of that one of his grandmother's neighbors had trespassed, insulted him, attempted to involve the police, or interfered in some way with his grandmother; and in all but one of the two Covington incidents, he did so with a machete attached to his belt.

Despite the several points of dissimilarity noted by defendant, the incidents were otherwise quite similar. After much conflict with Taylor regarding her daycare center, including calls to the police, and after an argument with Taylor's husband, defendant said to her, "Watch your family," while wearing a

sheathed machete on his belt. Similarly, apparently angry with Moreno because of his belief that she had called the police, defendant yelled at her, told her she had better watch her back and not call the police on her neighbors. Defendant lifted up his jacket, displayed the machete, and approached her with his hands on it as she walked away. When Weaver walked her dogs past the grandmother's house, defendant aggressively told her to keep her dogs off his property, told her that she had better watch herself and to watch her back, and that he would (or could) wipe her out. Defendant later approached her and made an intimidating gesture with his chest and arms while staring at her. When Covington rebuked defendant for swearing near the child care center he called her "bitch" and said, "I'm going to get you," and "Yeah, you scared. You scared." Another time, defendant commanded Covington not to greet his grandmother, and lifted his shirt to reveal his sheathed machete. We find no abuse of discretion in the trial court's finding that the incidents were sufficiently similar to be admitted as evidence that defendant harbored the specific intent that his words be taken as a threat.

Defendant contends that the uncharged incidents had no tendency to prove intent without evidence that the witnesses had knowledge of the prior confrontations with other neighbors. It appears defendant is conflating the intent element of section 422 with the requirement that his threat caused the victim to be in sustained fear for her own safety. Defendant's argument finds no support in the authorities on which he relies. Those cases held that evidence of a victim's knowledge of the defendant's crimes committed against others would be admissible to show that the victim's fear was reasonable, *and* may also show intent. (See *People v. Fruits* (2016) 247 Cal.App.4th 188, 203-204, and cases cited therein.) However, the cited authorities did not enunciate a

rule that knowledge of other victims was a prerequisite to the admission of other crimes evidence to show intent.

Defendant also contends that neither Moreno nor Weaver experienced fear, and he argues that their testimony could thus not prove that defendant intended to instill fear in Taylor. He cites no authority for his argument that uncharged incidents cannot be probative of intent unless the persons threatened in the uncharged incidents experienced fear, and we have found no such authority. As respondent points out, similar uncharged threats may be highly probative, not only of intent, but also of common design or plan, when it shows what happens when the defendant "'becomes upset with people who are not behaving or conforming with his expectations . . . .'" (*People v. Orloff* (2016) 2 Cal.App.5th 947, 956.) It is thus the *defendant's* uncharged conduct which renders the evidence admissible and probative, not the *victim's* reaction to the uncharged conduct.

In any event, we do not agree that Moreno and Weaver failed to experience fear. Moreno testified that she was "really afraid," although she did not want it to show. Although Weaver did not expressly say she was afraid, her fear is reasonably inferred from the circumstances. (See *People v. Ortiz (*2002) 101 Cal.App.4th 410, 417.) She testified that she felt nervous, unsafe, shaken, and unsettled. Again, the prior misconduct and the current crime need not be identical for the evidence to be probative of intent. (See *People v. Harris*, *supra*, 57 Cal.4th at pp. 841-842.) It follows that similar uncharged conduct need not meet all the elements of the charged conduct, including fear, to be probative of intent and thus admissible.

Defendant contends that Moreno's testimony should have been excluded for the additional reason that it was more prejudicial than probative, observing "[t]he fact that Ms. Moreno testified in front of a jury that appellant threatened her while

brandishing a machete is a discrepancy that in itself makes the uncharged act with Ms. Moreno far more prejudicial than probative." (Italics added.) Such testimony was, defendant argues, much more inflammatory than simply wearing the machete as his usual "attire" as he did when he threatened Taylor. Defendant exaggerates. Moreno testified that defendant lifted his shirt to reveal the machete, but kept it in its sheath. Thus, defendant did not *brandish*[3] the machete. Defendant does not explain how clothing or attire can be a weapon, and the evidence did not show that it was "usual" for the machete to be worn on defendant's belt. Taylor testified that she had seen him wearing it before, not that he usually or always wore it. The Moreno incident was thus not unduly inflammatory as compared to the Taylor incident. The trial court's ruling did not fall outside the bounds of reason.

II. Covington's testimony

Defendant contends that after granting the motion of acquittal (§ 1118.1) as to the Covington count, Covington's testimony became inadmissible character evidence under Evidence Code section 1101, subdivision (a). Defendant also contends that the trial court should have given the jury a limiting instruction.

A. Admissibility of the Covington testimony

Respondent argues that defendant has forfeited the issue by failing to object at trial to Covington's testimony on the ground stated here. A judgment may not be reversed by reason of the erroneous admission of evidence "unless [t]here appears of record an objection to or a motion to exclude or to strike the evidence

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[3] To "brandish" a weapon is "to shake or wave [it] menacingly." (Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/brandish>.)

that was timely made and so stated as to make clear the specific ground of the objection or motion." (Evid. Code, § 353, subd. (a).)

We have found no objection in the record to Covington's testimony on the ground urged here or on any ground at all. In reply, defendant argues that the issue was preserved as reflected in a colloquy between defense counsel and the trial court at the hearing on defendant's motion for new trial, when defense counsel stated: "I'm not sure whether the discussions subsequent to the court's granting of the 1118.1 motion happened on the record, and so I want to make sure that it does. That after the court granted the 1118.1 motion, there was an issue as to what would be done with Marcia Covington's testimony. And so over defense objection, the court allowed that to remain in as an additional 1101(b) . . . evidence."

The trial court did not confirm that such an objection had been made, but replied: "Okay. And the ruling would have been the same. First of all, the jurors heard it. It wasn't going away. So -- and there's ample other evidence for the other two witnesses who testified about [*sic*]." Defense counsel explained that she wanted to make certain the court's perspective was contained in the record. The court replied, "I understand. And . . . if it wasn't, then it is. And the jurors heard the evidence. . . . So even if it hadn't been a count and even if it had only been offered as 1101(b), I would have allowed it."

Defense counsel did not describe any objection, motion to strike or facts which made clear the specific ground for the objection; nor did she describe any facts indicating whether the objection was timely made. Now, on appeal defendant contends that the testimony should have been excluded because it was so inflammatory that its probative value was substantially outweighed by the potential for undue prejudice. As defendant has not demonstrated that he objected on this ground in the trial

court, we agree with respondent that the issue has not been preserved for appeal. An appellate court has no basis to review alleged error by the trial court "in failing to conduct an analysis it was not asked to conduct." (*People v. Partida* (2005) 37 Cal.4th 428, 435.)

B. Limiting instruction

Defendant contends that the trial court should have instructed the jury sua sponte to consider Covington's testimony solely for the purpose of finding intent in the remaining count.

The trial court instructed the jury with CALCRIM No. 375 in relevant part as follows:

> "The People presented evidence of other behavior by the defendant that was not charged in this case. You must consider this evidence only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the acts. . . . If you decide that the defendant committed the acts, you may, but are not required to, consider that evidence for the limited purpose of deciding whether the defendant acted with the intent that his statement be understood as a threat. In evaluating this evidence, consider the similarity, or lack of similarity, between the uncharged acts and the charged offenses. Do not consider this evidence for any other purpose. Do not conclude from this evidence that the defendant has a bad character or is disposed to commit a crime. If you conclude the defendant committed the acts, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove the defendant is guilty of criminal threats. The People must still prove the charge beyond a reasonable doubt."

Defendant argues that because CALCRIM No. 375 refers to *uncharged* conduct, and the incidents involving Covington were originally *charged*, the jury should also have been specifically told to consider the Covington incident only as evidence of intent. He asserts that it is absurd to assume that without an instruction specific to Covington, the jury would understand that CALCRIM No. 375, as given, would apply to previously charged conduct.

In general, trial courts have no duty to give limiting instructions sua sponte. (*People v. Valdez* (2012) 55 Cal.4th 82, 139.) This includes limiting instructions regarding uncharged criminal conduct. (*People v. Collie* (1981) 30 Cal.3d 43, 64.) "'When evidence is admissible . . . for one purpose and is inadmissible . . . for another purpose, the court *upon request* shall restrict the evidence to its proper scope and instruct the jury accordingly.'" (*People v. Valdez*, *supra*, at p. 139; Evid. Code, § 355.) In addition, where "[t]he standard instruction correctly and adequately explain[s] the applicable law to the jury, . . . the court [is] not required to rewrite it sua sponte. 'The trial court cannot reasonably be expected to attempt to revise or improve accepted and correct jury instructions absent some request from counsel.' [Citation.]" (*People v. Kelly* (1992) 1 Cal.4th 495, 535.)

As respondent notes, an argument similar to defendant's was made and rejected in *People v. Orloff, supra*, 2 Cal.App.5th 947. There, the defendant claimed that the limiting instruction was misleading because it specifically referred only to the threats against two persons in uncharged incidents and did not mention the threats against a third. The appellate court held that the defendant had forfeited the claim that the instruction was inadequate and misleading, as he "'did not object to or request amplification of the instructions provided.'" (*Id.* at p. 958, quoting *People v. Souza* (2012) 54 Cal.4th 90, 120.) The court also noted that the instruction made it reasonably clear that it

applied generally to evidence of "'other offenses of criminal threats that were not charged in this case,'" which included the third person. (*Ibid*.)

Here too it was made reasonably clear to the jury that the instruction applied to testimony regarding both the no-longer charged incident and the two never-charged incidents. First, immediately before reading the jury instructions, the trial court informed the jury that although there had been two counts at the start of trial, there was now just one. The court then instructed the jury that defendant was charged in count 1 with making a criminal threat to Taylor, and after explaining the elements of that crime, the trial court read CALCRIM No. 375. The jury thus knew that the incidents involving Covington no longer constituted *charged* evidence.

"It is fundamental that jurors are presumed to be intelligent and capable of understanding and applying the court's instructions. [Citation.]" (*People v. Gonzales* (2011) 51 Cal.4th 894, 940.) As the record reflects no confusion on the part of the jury or requests for further guidance on the point at issue, we do not presume that the jury failed to understand and correctly apply the instruction. (*Id*. at pp. 939-940.) There appears no reasonable likelihood that the jury construed the reference in CALCRIM No. 375 to "evidence of other behavior by the defendant that was not charged in this case" as not including Covington's testimony.

Regardless, any error was harmless. As there appears no reasonable likelihood that the jury misunderstood or misapplied the instructions given, defendant suffered no prejudice or federal due process violation as a result of the omission of language limiting Covington's testimony to the issue of intent. (See *People v. Peoples* (2016) 62 Cal.4th 718, 768.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT